Nos. 07-1059 and 07-1078

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

EURODIF S.A., ET AL.

USEC, INC., ET AL., PETITIONERS

v.

EURODIF S.A., ET AL.

On Writs of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF OF PROFESSOR RAJ BHALA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF PROFESSOR RAJ BHALA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*[1]

Professor Raj Bhala, the Raymond F. Rice Distinguished Professor at the University of Kansas,

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[1] Pursuant to this Court's Rule 37.6, amicus curiae states that no counsel for any party authored this brief in whole or in part, and no person or entity other than amicus curiae made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3, amicus curiae states that petitioners and respondents have consented to the filing of this brief. Concurrently with the filing of this brief, letters from petitioners and respondents granting consent to the filing of this amicus brief have been filed with the Clerk.

is an internationally recognized trade-law scholar. He has published a wide array of articles and books regarding international trade law including Modern GATT Law: A Treatise on the General Agreement on Tariffs and Trade (Sweet & Maxwell 2005), International Trade Law: Interdisciplinary Theory and Practice (LexisNexis 3d ed. 2008), Dictionary of International Trade Law (2008), and Rethinking Antidumping Law, 29 Geo. Wash. J. Int'l L. & Econ. 1 (1996). Since 2001, he has coauthored an annual review of decisions of the World Trade Organization in the Arizona Journal of International and Comparative Law. He has also worked as an advisor to the United States Department of Commerce and as a consultant to the Governments of Taiwan and Laos as well as to the World Bank and the International Monetary Fund. Professor Bhala is a member of the Council on Foreign Relations and the American Law Institute.

Professor Bhala provides this brief to help the Court understand the global and international-trade-law context of the parties' dispute. An examination and understanding of international obligations and rules strongly counsel in favor of interpreting the antidumping statute not to apply to the sale of services like those at issue in this case. In support of that proposition, Professor Bhala offers the following explanation and analysis relevant to an understanding of the United States' international trade obligations regarding antidumping practices.

SUMMARY OF ARGUMENT

In the aftermath of World War II, the United States embarked on a project of unprecedented scale—to create an international trade organization and to harmonize trade law for the benefit of all

nations. This led to the 1947 General Agreement on Tariffs and Trade. The 1947 agreement included extensive rules governing the rights of parties to the agreement to take remedial actions against acts of dumping by foreign exporters. The antidumping provisions of the 1947 agreement applied only to the sales of goods. They did not apply to the sales of services.

Almost fifty years later, over 150 nations have entered into the 1994 General Agreement on Tariffs and Trade. The 1994 agreement includes a specific agreement on the implementation of its antidumping provisions. As part of the Uruguay Round of Multilateral Trade Negotiations, GATT's antidumping provisions were changed in various ways that almost uniformly brought GATT and foreign antidumping practices closer to existing United States law. But one aspect of GATT's antidumping provisions that did *not* change was its limitation to sales of goods—it was not extended to the sales of services. In fact, as part of the Uruguay Round, a separate agreement called the General Agreement on Trade in Services was created expressly because the other provisions of GATT did not address the international sale of services.

In this case, however, Petitioners ask the Court to interpret the antidumping statute to allow the United States to impose antidumping duties not only on products sold for less than fair value but also on services sold for less than fair value. But under international trade law, the United States can apply dumping remedies only to the sales of goods, not to the sales of services. Thus, not only does Petitioners' interpretation of the statute conflict with its plain text, it would also, if accepted, place the United

States definitively out of step with its obligations under international trade law. The consequences of such a break with the United States' international obligations regarding trade in services could have significant consequences given that the United States' economy is largely based on the sale of services and its citizens export billions of dollars of services annually.

ARGUMENT

I. THE GOVERNMENT CAN IMPOSE ANTIDUMPING DUTIES ONLY WHEN GOODS ARE SOLD FOR LESS THAN FAIR VALUE.

Since 1921, United States law has authorized the imposition of antidumping duties when "foreign *merchandise is being, or is likely to be, sold* in the United States at less than its fair value." 19 U.S.C. §1673(1) (2006) (emphasis added).[2] The antidumping statute's plain language, both in its modern and in its earlier versions, limits the Department of Commerce's authority to impose antidumping duties only when sales of goods are made for less than fair value. *See Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (stating that statutory interpretation "begin[s] with the language of the statute" and goes no further "if the statutory language is unambiguous and the statutory scheme is coherent and consistent") (quoting *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 340 (1997)).

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[2] This language was first adopted in the Anti-Dumping Act, 1921, ch. 14, §201, 42 Stat. 11, which was codified at 19 U.S.C. §160, *et seq.* until 1979. It was subsequently reenacted in 1979 as Title VII of the Tariff Act of 1930, ch. 497, §1, 46 Stat. 590, when it was recodified in its current form.

Section 1673 never mentions or suggests that it covers services, as opposed to goods, sold for less than fair value. Given the statute's plain text referring only to the sale of merchandise, it is understandable why cases interpreting and applying the current and previous versions of the statute address only the sales of goods, not the sales of services. See *SNR Roulements* v. *United States*, 402 F.3d 1358, 1359 (CA Fed. 2005) ("'Dumping' refers to the *sale or likely sale of goods* at less than fair value.") (emphasis added); *Sango Int'l, L.P.* v. *United States*, 484 F.3d 1371, 1372 (CA Fed. 2007) ("The antidumping laws protect United States industries against the *domestic sale of foreign manufactured goods* at prices below the fair market value of those goods in the foreign country.") (emphasis added); *Zenith Elecs. Corp.* v. *United States*, 988 F.2d 1573, 1576 (CA Fed. 1993) ("Dumping is the sale of foreign manufactured goods in this country at less than the fair market value of those goods in the country of manufacture."); *Imbert Imports, Inc.* v. *United States*, 60 C.C.P.A. 123, 124-125, 475 F.2d 1189, 1190 (1973) (stating that antidumping investigation at issue was based on Treasury's allegation that certain cement "was being or was likely to be sold in the United States at less than fair value").

Similarly, the statute's legislative history presents no basis for extending the statute's authorization of antidumping remedies to the sale of services. See S. Rep. No. 96-249, at 15-16 (1979) (stating that under the new antidumping statute based on multilateral trade negotiations, "antidumping duties would be imposed" when it was determined, inter alia, that "a class or kind of merchandise is being or is likely to be sold in the United States at less-than-fair-value"), *as reprinted in* 1979 U.S.C.C.A.N. 381, 401-402.

Further, legislative materials related to the implementation of international obligations indicate that the antidumping statute is not intended to extend to the sales of services. The 1994 Statement of Administrative Action (SAA) regarding the Uruguay Round Agreement Act (implementing the 1994 GATT) describes at length the changes to United States antidumping law necessary to bring it into compliance with the 1994 GATT. H.R. Rep. No. 103-316, Vol. 1, 819-895 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 4040, 4151-4218. The SAA never suggests that GATT required that either the antidumping statute or Commerce's implementing regulations cover the sales of services. *Id.*; see also H.R. Rep. No. 103-316, Vol. 1 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 4040, 4050 ("[I]t is the expectation of the Administration that no changes in existing federal law, rules, regulations, or orders other than those specifically indicated in the implementing bill and this Statement will be required to implement the new international obligations that will be assumed by the United States under the Uruguay Round agreements.").[3]

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[3] Commentators comparing the antidumping laws before and after the 1994 GATT never even suggested that the scope of antidumping remedies were expanded to cover the sales of services. See, *e.g.*, Chung, U.S. Antidumping Laws: A Look at the New Legislation, 20 N.C. J. Int'l L. & Com. Reg. 495, 496 (1995) (explaining that the 1994 GATT Antidumping Agreement required only "modest changes to current U.S. antidumping laws" and never suggesting that sales of services were to be covered under United States law).

II. INTERPRETATION OF THE ANTIDUMPING STATUTE SHOULD BE GUIDED BY THE UNITED STATES' INTERNATIONAL TRADE OBLIGATIONS.

International law is part of United States law. *The Paquete Habana*, 175 U.S. 677, 700 (1900) (stating that "[i]nternational law is part of our law"); see also *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) ("[T]he Court is bound by the law of nations which is a part of the law of the land."). Consistent with this long- established principle, "[a]n Act of [C]ongress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray* v. *Schooner Charming Betsy (Charming Betsy)*, 2 Cranch 64, 118 (1804). Similarly, this Court has interpreted statutes so that they do not conflict with the United States' obligations under treaties. See, *e.g.*, *MacLeod* v. *United States*, 229 U.S. 416, 434 (1913) (construing a tariff-authorizing statute to only authorize duties that were consistent with international law)[4]; *Chew Heong* v. *United States*, 112 U.S. 536, 539-540 (1884) (interpreting statute in a manner that did not conflict with preexisting treaty); cf. *Karnuth* v. *United States ex rel. Albro*, 279 U.S. 231, 235 (1929) ("In reaching that conclusion the court seemed of [the] opinion that, if the statute was so construed as to exclude the aliens, it would be in conflict with article 3 of the Jay Treaty of 1794, a

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[4] See also *MacLeod*, 229 U.S., at 434 ("The statute should be construed in the light of the purpose of the government to act within the limitation of the principles of international law, the observance of which is so essential to the peace and harmony of nations, and it should not be assumed that Congress proposed to violate the obligations of this country to other nations, which it was the manifest purpose of the President to scrupulously observe, and which were founded upon the principles of international law.").

result, of course, to be avoided if reasonably it could be done.") (internal citation omitted).

For purposes of interpreting 19 U.S.C. §1673(1), the primary sources of international law regarding antidumping law to consider are Article VI of GATT 1994[5] and the Agreement on Implementation of Article VI of GATT 1994.[6] Both of these agreements were implemented under United States law by the Uruguay Round Agreements Act of 1994 (URAA). Pub. L. No. 103-465, 108 Stat. 4809 (1994) (codified at 19 U.S.C. §§3501, *et seq.*, plus scattered sections of title 19). Indeed, the URAA approved all multilateral WTO agreements emanating from the 1986–1994 Uruguay Round of multilateral trade negotiations.[7]

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[5] Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 108 Stat. 4809, 1867 U.N.T.S. 14, 33 I.L.M. 1125 (1994). The General Agreement on Tariffs and Trade is followed by every major trading nation in the world. *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 457 (1978).

[6] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 201 (1994). This is commonly known as the Antidumping Agreement.

[7] Except for certain plurilateral agreements that are not at issue in this case, all WTO agreements arising out of the Uruguay Round were accepted by the United States and other WTO Members as a single undertaking. Both GATT and the Antidumping Agreement are contained in Annex 1A to the Agreement Establishing the World Trade Organization.

The WTO Agreement and the Antidumping Agreement entered into force on January 1, 1995. For overviews of these two accords, see R. Bhala, International Trade Law: Interdisciplinary Theory and Practice 27-32, 35-36 (3d ed. 2008). GATT's 1994 iteration also entered into force on that date. GATT (in its 1947 version) has been in effect since January 1,

Although the *Charming Betsy* doctrine generally requires that statutes be interpreted consistently with international law, the URAA somewhat qualifies this doctrine. The URAA provides that in the event of a conflict between American law and its WTO obligations, the former takes precedence over the latter. 19 U.S.C. §3512(a)(1) ("No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.").[8]

1948. For a history of GATT, see R. Bhala, Modern GATT Law (2005).

[8] Because of this qualification, scholars and commentators have questioned the applicability of the *Charming Betsy* doctrine in certain cases involving the international trade agreements and agency interpretations of domestic statutes. See Canizares, Comment, Is *Charming Betsy* Losing Her Charm? Interpreting U.S. Statutes Consistently with International Trade Agreements and the *Chevron* Doctrine, 20 Emory Int'l L. Rev. 591 (2006); Nichols, Use of WTO Panel Decisions in Judicial Review of Administrative Action Under U.S. Antidumping Law, 1 Int'l L. & Mgmt. Rev. 237 (2005); Seastrum, *Chevron* Deference and the *Charming Betsy*: Is there a Place for the Schooner in the Standard of Review of Commerce Antidumping and Countervailing Duty Determinations, 13 Fed. Cir. B.J. 229 (2003); Restani & Bloom, Interpreting International Trade Statutes: Is the *Charming Betsy* Sinking?, 24 Fordham Int'l L.J. 1533 (2001); Williams, *Charming Betsy*, *Chevron* and the World Trade Organization: Thoughts on the Interpretive Effect of International Trade Law, 32 Law & Pol'y Int'l Bus. 677 (2001). The Federal Circuit has been inconsistent in its use of the *Charming Betsy* doctrine in antidumping cases. Compare *Corus Staal BV* v. *Dep't of Commerce*, 395 F.3d 1343, 1347-1349 (CA Fed. 2005) (refusing to apply *Charming Betsy* doctrine in antidumping case) with *Allegheny Ludlum Corp.* v. *United States*, 367 F.3d 1339, 1345 (CA Fed. 2004) (applying *Charming Betsy* doctrine in interpreting an antidumping

But the URAA's qualification of *Charming Betsy* does not apply in this case. The President's Statement of Administrative Action that was approved by Congress, states that "[s]ection [3512](a)(1) will not prevent implementation of federal statutes consistently with the Uruguay Round agreements, where permissible under the terms of such statutes." H.R. Rep. No. 103-316, Vol. 1 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 4040, 4050. In other words, unless the statutory text unambiguously conflicts with GATT or the Antidumping Agreement, §3512(a)(1) does not require the Court to create a conflict between a statute and GATT and thereby put the United States in violation of its international-trade-law obligations. And because Congress approved the SAA, its interpretation of §3512(a)(1) controls. 19 U.S.C. §3512(d) ("The statement of administrative action approved by the Congress under section 3511(a) of this title shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application."). In fact, it would be contrary to the express provisions of the SAA to construe unnecessarily the antidumping statute to conflict with GATT and the antidumping agreement. The SAA, expressly states that "[t]he implementing bill, including the authority granted to federal agencies to promulgate implementing regulations, is

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statute). But the Court does not need to decide this issue in this case because, as explained above, the qualification is irrelevant given the absence of a conflict between the URAA and the United States' international trade obligations.

intended to bring U.S. law fully into compliance with U.S. obligations under [the Uruguay Round] agreements." H.R. Rep. No. 103-316, Vol. 1 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 4040, 4050.

Thus, properly construed, §3512(a)(1) requires that the Court apply the *Charming Betsy* principle in this case. As this Court has previously explained, "[i]f the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements." *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 539 (1995); see also *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 164-165 (2004) (explaining that the *Charming Betsy* doctrine "helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today's highly interdependent commercial world").

III. INTERNATIONAL TRADE LAW ONLY ALLOWS ANTIDUMPING DUTIES TO BE IMPOSED ON GOODS SOLD FOR LESS THAN FAIR VALUE.

The Respondents' merits brief explains why the transactions at issue—contracts for the sale of uranium-enrichment services that are known as Separative Work Units ("SWU") contracts—are contracts for the sales of services and are not contracts for the sale of goods or merchandise. Eurodif Respondents' Br. 34–52. Given that SWU contracts are contracts for the sales of services, Commerce's proposed interpretation of the antidumping statute in this case is inconsistent with the United States' obligations under GATT 1994 and the Antidumping Agreement.

A. GATT Article VI Applies Only to the Sales of Goods.

The 1947 General Agreement on Tariffs and Trade was forged in the aftermath of World War II. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194. Article VI of the 1947 GATT is the foundation of modern multilateral antidumping law. Specifically, as originally stated in 1947 and as maintained to the present day, Article VI repeatedly and explicitly refers only to the sales of products, not services. For example, paragraph 1 of the article provides that "a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product" is less that certain comparative prices or costs. Art. VI, Para. 1. Similarly, paragraph 7 of Article VI, which describes the effect of certain price-stabilization systems on dumping determinations, expressly refers to the effects of such systems on prices charged on "the sale of the commodity for export." *Id.*, at Para 7.[9] Nowhere in Article VI does the word "service" (or a synonym thereof) appear. Rather, the key and oft-repeated word delineating the scope of application of GATT Article VI is "product" or "commodity."[10]

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[9] Article VI is followed by an Interpretative Note. As with the main text of Article VI, nothing in the Interpretative Note suggests antidumping law applies, or ought to be extended, beyond the realm of sales of products.

[10] Article VI is printed in its entirety in the appendix to this brief. See App. 1a-4a.

The WTO's Appellate Body[11] applies a lexicographic approach, as a necessary and sometimes sufficient methodology, in keeping with the 1969 Vienna Convention on the Law of Treaties.[12] Vienna Convention on the Law of Treaties (Treaty Convention), May 23, 1969, art. 26, 1155 U.N.T.S. 331, 339 (governing the interpretation of treaties and directing courts to look first to the plain language of a treaty when attempting to determine its meaning); see also *United States* v. *Alvarez-Machain*, 504 U.S. 655, 663 (1992) ("In construing a treaty, as in construing a statute, we first look to its terms to determine its meaning."). Article 31(1) of the Vienna Convention requires that treaties "be interpreted in good faith in accordance with the ordinary meaning" of the terms of that treaty "in their context and in the light of its object and purpose." 1155 U.N.T.S., at 340.

Following that practice to the present case, nothing in the text of Article VI supports the application of a dumping duty to the sale of a service because the standard lexicographic meaning of "product" does not envision a service. In determining lexicographic

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[11] The Appellate Body is the WTO's highest adjudicatory authority regarding trade disputes. The Appellate Body is charged with determining points of law. It is not authorized to change the rights or obligations of the WTO's member nations.

[12] On the origins, meaning, and use of the Vienna Convention, and its status as both codifying customary international law and contributing to the progressive development of international law, see Stephen C. McCaffrey, Understanding International Law §4.05, at 78-125 (2006); *Mora* v. *New York*, 524 F.3d 183, 196, n.19 (CA2 2008). On how the Appellate Body interprets agreements on trade remedies, including the Antidumping Agreement, see Asif H. Qureshi, Interpreting WTO Agreements—Problems and Perspectives, at 173-180 (2006).

meaning, the Appellate Body consistently and heavily relies on The New Shorter Oxford English Dictionary.[13] The New Shorter OED defines

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[13] For a discussion of WTO litigation, see R. Bhala, International Trade Law: Interdisciplinary Theory and Practice chs. 5-6 (3d ed. 2008).

For discussions of the Appellate Body's use of *The New Shorter OED*, or other editions of the *OED*, in decisions adopted by the WTO Dispute Settlement Body, see Bhala & Gantz, WTO Case Review 2006, 24 Ariz. J. Int'l & Comp. L. 299, 313-316 (2007) (observing the use of *The Concise OED* in an antidumping case, Appellate Body Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R (Mar. 6, 2006) (adopted Mar. 24, 2006)); Bhala & Gantz, WTO Case Review 2005, 23 Ariz. J. Int'l & Comp. L. 107, 247 (2006) (discussing the use of *The New Shorter OED* and *The Shorter OED* in Appellate Body Report, *United States—Subsidies on Upland Cotton*, WT/DS267/AB/R (Mar. 3, 2005) (adopted Mar. 21, 2005)); Bhala & Gantz, WTO Case Review 2004, 22 Ariz. J. Int'l & Comp. L. 99, 136-137, 158-159 (2005) (concerning use of *The Shorter OED* in Appellate Body Report, *Canada—Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R (Aug. 30, 2004) (adopted Sept. 27, 2004), and in Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, (Apr. 7, 2004) (adopted Apr. 20, 2004)); Bhala & Gantz, WTO Case Review 2003, 21 Ariz. J. Int'l & Comp. L. 317, 342 (2004) (noting the use of the *New Shorter OED* in an antidumping case involving the United States, Appellate Body Report, *United States—Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R (Jan. 16, 2003) (adopted Jan. 27, 2003)); Bhala & Gantz, WTO Case Review 2001, 19 Ariz. J. Int'l & Comp. L. 457, 500, 502, 535, 550, 584 (2002) (commenting on the use of the *New Shorter OED* (1993), and the *Concise OED* (1995), in Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled, and Frozen Beef*, WT/DS161/1, WT/DS169/1 (adopted Jan. 10, 2001), noting the use of an *OED* edition in an antidumping case Appellate Body Report, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R

"product" in three contexts, the first and third of which, mathematics and chemistry, respectively, are irrelevant to this case. In the second context, which is the broadest of the three and covers the ordinary meaning of the noun, The New Shorter OED says:

> "Product . . . 2 A thing produced by an action, operation, or natural process; a result, a consequence; spec. that which is produced commercially for sale. Also, (agricultural) produce. LI6 . . . b. A quantity; a supply, a stock. rare. MI7-MI8. c. The value of goods produced. LI9. . . ."[14]

That The New Shorter OED's definition of "product" does not envision intangible things like services is further demonstrated by its reference to the definition of the verb "produce." The New Shorter OED states:

> "Produce . . . 3 . . . c. Of a country, region, process, etc.: yield or supply (a commodity etc.). LI6. d. Compose, make or bring into existence by mental or physical labor (a material object). MI7. . ."[15]

Construing Article VI to also encompass sales of services would stretch the meaning of the word "product" rather uncomfortably beyond what it is ordinarily understood to mean in the context of

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(Mar. 1, 2001) (adopted Mar. 12, 2001), describing the use of the *New Shorter OED* in Appellate Body Report, *United States—Antidumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R (Jul. 24, 2001) (adopted Aug. 23, 2001)).

[14] *The New Shorter OED*, at 2367.

[15] *The New Shorter OED*, at 2367 (emphasis added).

international trade law—a good, or equivalently, an item of merchandise. Thus, the explicit references throughout Article VI that relate to the sales of products are not properly construed to also cover the sales of services.

B. Neither GATT Jurisprudence Nor the URAA's Legislative History Support The Application of Antidumping Law to the Sale of Services.

Stretching the word "product" to cover both goods and services becomes more uncomfortable in the environment of antidumping law and GATT Article VI. The WTO Appellate Body routinely follows Article 31(1) of the Vienna Convention. If the Appellate Body's lexicographic analysis of a key term left room for maneuver, then it would look to the context of the terms, and the object and purpose of the international agreement in which the term is used.

Performing a full-blown replication of the rest of a possible WTO Appellate Body examination is unnecessary for present purposes. Rather, it suffices to outline, based on extensive past reported decisions, how the Appellate Body would proceed if it sought to buttress the lexicographic analysis. It would examine the context of "product" in GATT generally and Article VI specifically and review of the object and purposes of GATT (especially as laid out in the Preamble to GATT). Doubtless, this process would yield the conclusion that "product" in Article VI is essentially synonymous with "good" or "merchandise." Thereafter, the Appellate Body would be inclined to offer two further points, as yet more support for the ordinary meaning of "product" in Article VI: past jurisprudence and legislative

history. Neither supports the application of antidumping law to the sale of services.

First, in the history of GATT jurisprudence before the advent of the WTO and its Appellate Body on January 1, 1995, no antidumping case ever applied an antidumping remedy to the sale of services.[16] That is for good reason. Until 1995, multilateral trade law did not even encompass services. Thus, no GATT panel operating under pre-WTO dispute settlement procedures would, or could, have contemplated stretching the meaning of "product" to cover services under Article VI.

Second, the official contemporaneous records of the United States during the 1946-47 negotiations of GATT do not indicate any intention by GATT's drafters to apply Article VI to the sale of services. The United States' and the United Kingdom's 1945 Proposal on World Trade and Employment, which lays out the vision for GATT, repeatedly refers to GATT's purposes in the context of the sale of goods.[17] Similarly, neither the 1946 Suggested Charter for an International Trade Organization, which elaborates on the 1945 Proposal[18]; the 1947 Analysis of GATT,

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[16] See R. Bhala, Modern GATT Law ch. 25, ¶¶ 25-020–25-024 at 694-697 (discussing antidumping cases in early GATT history).

[17] See Proposal on World Trade and Employment—Joint Statement by the United States and United Kingdom and Proposals for Expansion of World Trade and Employment, DEP'T ST. BULL., Dec. 9, 1945, 912-929.

[18] SUGGESTED CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION OF THE UNITED NATIONS, Dep't of State Publication No. 2598, Commercial Policy Series 98, Sept. 1946, 5-6.

which explains what GATT means[19]; nor the 1947 Geneva Charter for an International Trade Organization—A Commentary, which summarizes the negotiating history and the Charter for an International Trade Organization[20]; suggests either that the United States or its negotiating partners who drafted GATT sought to create a text that might one day allow for the application of antidumping law to the international sale of services.

C. The WTO Antidumping Agreement Covers the Sale of Goods Alone.

The argument concerning GATT Article VI applies in nearly parallel fashion to the Antidumping Agreement, which consistently refers to the sale of a "product."[21] As in Article VI of GATT, the ordinary meaning of that term as used in the Antidumping Agreement does not encompass the sale of services. The word "service" never appears in the Antidumping Agreement. Moreover, the use of the word "product," and the absence of the word "service," in the agreement is not surprising. The Uruguay Round negotiators set out, and succeeded in, elaborating on the rules of Article VI. Indeed, the full, formal title of the agreement explicitly refers to Article VI.

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[19] ANALYSIS OF GENERAL AGREEMENT ON TARIFFS AND TRADE, Dep't of State Publication No. 2983, Commercial Policy Series 1947, 4-194 (laying out the concessions the United States obtained from other countries on trade in goods); *id.*, at 197 (commenting on the abuse of antidumping law).

[20] THE GENEVA CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION—A COMMENTARY, Dep't of State Publication No. 2950, Commercial Policy Series 107, 1947 (all of which is set in the context of the trade of products).

[21] The Antidumping Agreement is available at http://www.wto.org/english/docs_e/legal_e/19-adp.pdf.

Three further points support the ordinary meaning of the word "product" as used in the Antidumping Agreement: recent jurisprudence, Uruguay Round negotiating history, and Uruguay Round legislative history. First, in the entire history of WTO jurisprudence, which began January 1, 1995, no antidumping case ever applied antidumping remedies to the sale of a service. That hardly is for want of cases. To the contrary, the WTO Appellate Body has adjudicated a large number of antidumping controversies.[22]

Second, the history of the Uruguay Round negotiations evinces no intention on the part of the negotiators of the Antidumping Agreement to apply that Agreement to services. There is no indication they sought to frame a text with the flexibility so that it might one day allow for this possibility. To the contrary, all arrows point to the application of the antidumping remedy only to sales of goods.[23]

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[22] The full listing of Appellate Body cases, by subject matter (as well as countries and years), is available at the WTO's website, www.wto.org.

[23] For example, the WTO Secretariat's Guide to the Uruguay Round Agreements clearly identifies only the sales of "goods" as the target for antidumping actions. WTO Secretariat, Guide to the Uruguay Round Agreements 80-89 (1999). Similarly, an exhaustive four-volume history of the Uruguay Round negotiations, authored and edited by a long-time and distinguished American trade-law practitioner, never even suggests that any provisions in any of the drafts of the antidumping agreement, let alone the final document, showed an intent to expand the scope of coverage of antidumping law beyond the sales of goods. See T. Stewart et al., II The GATT Uruguay Round—A Negotiating History (1986-1992) 1383-1710 (Terence P. Stewart ed., 1993).

Third, the legislative history in the United States to the URAA—the Statement of Administrative Action (SAA) says nothing about the application of antidumping law to services.[24] The SAA is—as a legal matter—the definitive legislative history to the URAA.[25] It was filed by the Clinton Administration when seeking Congressional passage of the URAA. Nothing in the SAA on the Antidumping Agreement remotely suggests that the government believed that agreement applied, or could be extended, to cover the sales of services.

The SAA's discussion of antidumping law focuses on remedies for allegedly dumped imports—*i.e.*, products sold by foreign exporters to customers in the United States. For example, the SAA explains how, when calculating a dumping margin, to account for profits, and certain expenses, associated with them as sold in an importing country vis-à-vis profits and expenses associated with sales of a foreign like product in an exporter's home market.[26] The goal is to get a fair comparison of the export (or constructed export) price and normal value, *i.e.*, what is known in the trade-law community as an apples-to-apples comparison of the price of allegedly dumped merchandise against home market sales. This analysis, as described in the SAA, makes sense only in the context of sales of goods.

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[24] H.R. Rep. No. 103-316, Vol. 1, at 807-895 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 4040, 4040-4412.

[25] That is because, as set out at the start of the URAA itself, Congress approved the SAA. See 19 U.S.C. §3511(a)(2).

[26] H.R. Rep. No. 103-316, Vol. 1, at 807, 809 (1994), as reprinted in 1994 U.S.C.C.A.N. 4040, 4151-4153.

D. GATS Is Deliberately and Meaningfully Distinct From the Antidumping Agreement.

The separate placement of the antidumping agreement and General Agreement on Trade in Services (GATS) within the grand scheme of multilateral trade law further reinforces the point that sales of services are not covered by antidumping law.[27] Both are in Annexes to the WTO Agreement, but each is in an entirely distinct Annex. The antidumping agreement appears in Annex 1A to the WTO Agreement, which is entitled "Multilateral Trade Agreements on Goods." It contains thirteen such agreements, including GATT 1994, which incorporates by reference the entire 1947 GATT text and the Agreement on Implementation of Article VI of GATT 1994. These agreements are monitored and administered by a WTO Council on Goods. In contrast, GATS is in Annex 1B, and is reviewed by a Council on Services.[28]

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[27] GATS is published on the WTO website, www.wto.org, and reprinted in a variety of sources, including R. Bhala, Documents Supplement for International Trade Law: Interdisciplinary Theory and Practice, Document 29, 489-522 (3d ed. 2008).

[28] GATS defines "trade in services" to mean "the supply of a service: (a) from the territory of one Member into the territory of any other Member; (b) *in the territory of one Member to the service consumer of any other Member*; (c) by a service supplier of one Member, through commercial presence in the territory of any other Member; (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member." General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125, 1167 (1994) (emphasis added).

Overall, the structure of multilateral trade law is logical and straightforward. The WTO Agreement is the umbrella document. It establishes the WTO as an institution, and, *inter alia*, explains key points about membership in that international body. The logic of this structure is simple: three things are traded across borders—goods, services, and intellectual property. Thus, regulations governing the importation and exportation of goods, services, and IP are set out in Annex 1. That Annex is subdivided along the lines of what is traded. As just explained, Annex 1A covers sales of goods and Annex 1B covers sales of services. Intellectual property is covered by Annex 1C.

While various accords in Annexes 1A, 1B, and 1C do refer to one another, they are designed to be largely self-contained and mutually exclusive. Notably, there is no reference in the antidumping agreement to GATS, nor any reference in GATS to the antidumping agreement. That is, there is no indication in either the antidumping agreement or GATS that sales of services, regulated by GATS, are susceptible to the trade remedy of an antidumping action.

E. Applying Antidumping Law To Sales of Services Would Be Problematic.

Petitioners' argument that antidumping law can be applied to transactions involving the sale of services, if accepted, would likely lead to very significant problems regarding how to classify domestic and foreign services for purposes of comparing them in

order to determine whether a dumping remedy should be imposed.[29]

One important reason why international obligations on antidumping law do not apply to the sales of services arises from the different ways services are traded, classified, and compared. Goods move across borders in physical form, and are classified according to roughly 8,000 standard product categories and sub-categories (using 4- and 6-numerical digit classifications, respectively) in the Harmonized System.[30] The World Customs Organization administers and refines the Harmonized System. There is a long history of GATT and WTO jurisprudence on discerning whether a product sold into a domestic market by a foreign exporter (such as an allegedly dumped good) is "like" a domestic product (that the imported product, if dumped, allegedly injures or threatens with injury). The key cases are the 1970 GATT Working Party Report in Border Tax Adjustments and the 1996 Japan Alcoholic Beverages and 2004 Asbestos decisions of the WTO Appellate Body.[31] Essentially,

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[29] As noted by Respondent Ad Hoc Utilities Group, uranium-enrichment services are categorized as services that are governed by GATS, which does not provide an antidumping remedy. See Ad Hoc Utilities Group Respondent's Br. 48 n.32. The problems that would be created with respect to how to classify services for antidumping law purposes are described to inform the Court of the practical problems that could arise if the Petitioners' argument is accepted.

[30] See R. Bhala, International Trade Law: Interdisciplinary Theory and Practice ch. 17 at 523-532 (3d ed. 2008).

[31] See Report of the GATT Working Party, *Border Tax Adjustments*, ¶18L/3464 GATT B.I.S.D. (18th Supp.) at 97 (1972); Appellate Body Report, *Japan—Taxes on Alcoholic Beverages* §H.1(a) (WT/DS8/AB/R, WT/DS10/AB/R, and

they stand for the proposition that products are tested for "likeness" based on their physical characteristics, end uses, and consumer behavior. None of these cases involved antidumping law, but the test for "likeness" they articulate is used in the context of trade remedies.

The world of services is very different. Services are sold across international boundaries in four ways, called "modes:" cross-border supply, consumption abroad, commercial presence (*i.e.*, foreign direct investment), and temporary movement of persons (*i.e.*, immigration).[32] There is no definitive system for classifying all service sectors, sub-sectors, and sub-sub-sectors. During the Uruguay Round, negotiators agreed on an inchoate scheme created through research conducted by the United Nations, GATT, and WTO Secretariats. That scheme is still in use.[33]

WT/DS11/AB/R) (Oct. 4, 1996) (adopted Nov. 1, 1996); Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶¶134-148, WT/DS135/AB/R (adopted Mar. 12, 2001). *See also* R. Bhala, Modern GATT Law ch. 1 ¶¶1-026–1-031 at 19-22 (2005) (discussing these and related cases).

[32] See R. Bhala, International Trade Law: Interdisciplinary Theory and Practice ch. 47, at 1541-1551 (3d ed. 2008).

[33] See R. Bhala, International Trade Law: Interdisciplinary Theory and Practice ch. 47, at 1551-1554 (3d ed. 2008).

There are two key documents in services trade classification, (1) the WTO Services Sector Classification List, or "W120," and (2) the imprudently titled United Nations Central Product Classification ("CPC") List. The W120 identifies 11 standard service sectors (and a range of sub-sectors and sub-sub-sectors), and is based on the CPC List. Use of the word "Product" in the rubric of the latter document perhaps may be explained by haste. The United Nations still had not completed the list when formal negotiations in the Uruguay Round ended in December 1993.

The WTO Appellate Body's decisions on whether services provided by foreign service suppliers are "like" a service sold by a domestic supplier have barely begun to evolve. There are few cases addressing the issue. Of the existing cases, one involves services supplied in connection with bananas, and another concerns on-line gambling.[34] Neither of these Appellate Body reports has developed a mature test on comparing foreign and domestic services.

Antidumping law rests firmly on the ability to compare and contrast "like" products. Only if dumped merchandise injures (or threatens with injury) a "like" good produced domestically is imposition of an antidumping duty lawful under international and United States law. Without a mature test for differentiating "like" from "unlike" services, applying antidumping law to the sale of services likely would be highly problematical—potentially unjustly over-inclusive in some cases, and under-inclusive in other cases. And this is not an insignificant problem because determining whether or not different products are "like" lies at the very core of antidumping law.

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[34] See, respectively, Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (adopted Sept. 25, 1997), and Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (adopted Apr. 20, 2005).

IV. Doha Round Negotiations Do Not Contemplate the Future Application of Antidumping Law to the Sale of Services.

The new round of multilateral trade negotiations—the Doha Development Agenda, known more commonly as the Doha round—was launched in Doha, Qatar in November 2001.[35] The WTO Doha Ministerial Conference Declaration establishing the DDA provides a mandate for trade negotiators representing the now 152 nations that are WTO members. Paragraph 15 of the Doha Agenda calls on the WTO's members to offer each other improved market access on services, through all four modes of delivery. The mandate (in Paragraph 28) also urges them to "clarify[] and improve[] disciplines" on antidumping law. The DDA never remotely intimates that WTO Members negotiate with a view to expanding trade remedies, such as antidumping law, to encompass services.

The Doha round negotiations have dragged on for seven years. At no point during the Round has the expansion of antidumping law to cover services entered into any of the draft negotiating texts prepared by the appropriate negotiating committee chairman. Indeed, the topic simply has not been part of any serious proposal from any major Member (if any proposal from any Member at all). Thus, the latest draft negotiating text, issued by the chairman in May 2008, covers a vast array of antidumping issues, but assuredly not the application of

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[35] The Doha Agenda is published on the WTO website, www.wto.org, and reprinted in a variety of sources, including R. Bhala, Documents Supplement for International Trade Law: Interdisciplinary Theory and Practice, Document 35, 633-645 (3d ed. 2008).

antidumping duties to services. Notably, however, a small part of the services negotiations cover the possible creation of a brand new trade remedy for services—a special services safeguard. That the Doha Round participants have discussed creating this new remedy further shows that the participants do not, and have not, intended for the broader antidumping remedy to apply to the sales of services.

To be sure, the Doha round has yet to conclude successfully. Whether it will is uncertain. Talks remain mired in issues unrelated to the present case, particularly reductions to agricultural tariffs and subsidies, and non-agricultural market access. Nevertheless, given recent negotiating history, it would be shocking if the Doha round concluded with an agreement to apply conventional antidumping rules to sales of services. As things currently stand, there is no reason to think that international law on antidumping is evolving in the foreseeable future to include the sale of services in its scope. For Commerce to apply domestic antidumping law to the sale of services would be incongruous with the direction of multilateral trade negotiations.

Commerce's imposition of antidumping duties on transactions involving the sale of services could also complicate further the conclusion of the Doha round of negotiations. The United States has already injected tremendous controversy into the Doha round because of Commerce's use of a particular methodology called "zeroing" when calculating dumping margins.[36] The United States has lost every

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[36] "Zeroing" is defined in R. Bhala, Dictionary of International Trade Law 529, 534-535 (2008) (table following entry on "zeroing"). For further elaboration of the methodology, see, *e.g.*,

zeroing case at the WTO.[37] Because Congress has not amended the antidumping statute to conform with the WTO Appellate Body's rulings, the Federal Circuit has held it cannot order Commerce to cease its use of the methodology.[38] The American negotiating team in the Doha round insists that the Appellate Body's rulings must be overturned in the round so that Commerce's zeroing methodology is legitimated under the antidumping agreement. Given the immense controversy the United States has already created because of Commerce's decision regarding zeroing, any construction of the antidumping statute to cover the sales of services holds the potential to make these negotiations even more complicated.

V. Applying Antidumping Law to Services Would Risk Retaliation by Foreign Governments Against American Service Providers.

In addition to the textual reasons why GATT Article VI and the antidumping agreement do not apply to the sale of services, there is also a policy rationale. If Commerce were authorized to apply American antidumping law to services, in breach of America's international-trade-law obligations, then antidumping authorities in other WTO Members might follow suit. Were they to do so, important

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R. Bhala, International Trade Law: Interdisciplinary Theory and Practice 1023-1036 (3d ed. 2008).

[37] These cases are listed and summarized in R. Bhala, Dictionary of International Trade Law 530-534 (2008) (table following entry on "zeroing").

[38] See, *e.g.*, *Timken Co.* v. *United States*, 354 F.3d 1334, 1347 (CA Fed. 2004).

economic interests of the United States—far beyond any narrow sector like uranium enrichment—would be compromised.

America is a service-oriented economy, and indeed the pre-eminent such power in the world. Roughly seventy to eighty percent of the gross domestic product of the United States is accounted for by services. And approximately eight of ten Americans are employed in service industries. For all the attention the business, financial, and political media give to the large and seemingly endless American trade deficit, little coverage is given to the fact the United States has a surplus in services trade with the rest of the world. American architects, bankers, broker-dealers, doctors and health care workers, educators, engineers, fund managers, insurance experts, investment analysts, lawyers, researchers, tourism and travel professionals, and other service providers export their services to foreign nationals around the world. Indeed, many of them anticipate—or at least hope for—enhanced market access for their services through a successful Doha Round conclusion.

If Commerce is permitted to apply antidumping law to the sales of services, any short-term gains for petitioners in this particular antidumping action might be wiped out by the long-term vulnerability American service exporters incur. Dozens of WTO Members have developed the practical legal capacity to bring antidumping actions, in accordance with GATT Article VI and the antidumping agreement, against foreign producers and exporters of goods. Those countries include China, India, Mexico, Brazil, and other significant (in terms of value and volume) markets like the European Union, for present and

hoped-for future American service providers. If Commerce's approach in this case became contagious, then American service providers would be prominent targets of foreign antidumping actions. In turn, if foreign governments imposed antidumping duties on these providers, it would have negative effects for American output, employment, and export performance.

CONCLUSION

For the foregoing reasons, the international-trade-law obligations incumbent on the United States concerning antidumping duties do not apply to the sale of services. Because, as explained in Respondents' brief, uranium-enrichment contracts involves the sale of services, then the United States' international obligations under GATT Article VI and the WTO antidumping agreement are inapplicable to uranium-enrichment contracts. In turn, application by Commerce of American antidumping law to enrichment contracts would be contrary to the United States' obligations under international trade law.

Respectfully submitted,

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